Filed 5/25/07 P. v. Horton CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL R. HORTON, Defendant and Appellant.	B190240 (Los Angeles County Super. Ct. No. KA073069)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Judge. Affirmed.

Roderick W. Leonard, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Chung L. Mar, Kenneth N. Sokoler and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Horton was convicted of one count of unlawfully taking a vehicle, one count of grand theft of personal property, and one count of misdemeanor resisting a peace officer. (Veh. Code, § 10851, subd. (a); Pen. Code, §§ 487, subd. (a), 148, subd. (a)(1).)[1] He was sentenced to state prison for a term of three years. Horton appeals, contending a holdout juror was impermissibly coerced to vote for guilt, challenging the sufficiency of the evidence in support of the grand theft count, and claiming there were sentencing errors. We reject his claims of error and affirm the judgment.

FACTS

George Davis parked his Toyota truck in front of a store, left the keys in the ignition, and went into the store to say hello to a friend. A moment later, Davis and his friend walked outside and stood talking near Davis's truck. "All of [a] sudden, [Davis] heard somebody [take his] truck, driving fast. And [he] saw [his] truck take off . . . . They hit one car and also they go back, hit the wall, and he [took] off again." Davis (using his "Lo-Jack" system) alerted the police that his truck had been stolen. Although Davis did not see the thief, Keithroy Potter (who had been installing tiles at a nearby store) saw Horton walk a three-wheel cycle through a parking lot, park the cycle, get into Davis's truck, and drive away.

About an hour later, Glendale Police Officer James de Mond received a "Lo-Jack signal" and soon spotted the truck, activated the lights on his patrol car, and turned a spotlight on the truck. Horton jumped out and ran off,

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[1] Subsequent undesignated section references are to the Penal Code.

ignoring the officer's commands to stop and running into an apartment complex, stopping only when he saw that a second officer had joined the chase. Horton was detained, then arrested after Potter identified him in the field. A subsequent examination of the truck revealed that its television and DVD systems as well as its air conditioning were broken, that two television monitors in the backs of the headrests had been pulled out, and that one of the monitors was missing (as were a rearview mirror, an antenna for the television system, and a remote control for the television and DVD systems).

Horton was charged with the crimes noted above plus one count of grand theft auto and one count of misdemeanor hit and run driving. Following a trial at which the People presented evidence of the facts summarized above (and at which Horton did not present a defense), Horton was convicted of taking the truck, grand theft of personal property, and misdemeanor resisting arrest. The grand theft auto count was dismissed before trial and the jury deadlocked on the hit and run count, as to which the court declared a mistrial, then later dismissed it.

DISCUSSION

I.

Horton contends the judgment cannot stand because the trial court coerced Juror No. 8 "to vote for guilty." The claim is belied by the fact that the jury deadlocked on the dismissed hit and run count, with Juror No. 8 as the sole holdout. For this reason and because the juror was in no way coerced, we reject Horton's claim of error.

A.

The jury began deliberating at 2:33 p.m. on February 22, 2006. At 9:50 a.m. the next day, the jury sent this note to the court: "Juror #8 would like to address the judge. (Personal matter.)" At side bar with the lawyers, the trial court asked Juror No. 8, "What would you like to address to the court?" Crying, she responded:

"You know -- I guess it's just coming to light that it's a lot of pressure . . . in the jury room because I seem to be outnumbered. Yesterday during deliberations I had to sit through a whole hour or so of just -- it was pretty much third degree. I was asked pretty much [to] act as a lawyer. . . . I felt like I was being personally attacked . . . . [¶] . . . [¶] . . . I kept it altogether and I didn't say anything. I just kept responding in a respectful manner. We deliberated and we just came to terms that we weren't agreeing [and] were going to come back tomorrow. But when I went into the parking lot, . . . it became very clear to me that I was pretty much cracking under the pressure. And when I came in this morning, came back open minded, I was willing to hear it, and everybody in there is just making me -- . . . I feel demonized. . . . I'm not saying they are doing it on purpose. It's just that I honestly feel I can't change my mind. I honestly feel that I've made my mind up, you know, and we're deliberating. We're discussing. That's okay. But everybody is asking me to be open minded enough to change my mind. And I'm asking them to be open minded enough to change their mind[s].

"If they're asking me to do that, I'm asking them too, but they don't see it that way. So anytime there is a question, . . . everybody looks at me like I'm the one [who] has to be -- pretty much it's all up on me. . . . [It is] my interpretation

of the law or the instructions that if I pretty much made my decision, I thought that I didn't have to be convinced by everybody else. I'm very confused . . . and I don't know pretty much if I can go back in there and take it again because all it is at this point is everybody on top of me to read me the law. To not pick at everything that I say, not pick at every little word. ***I've already pretty much agreed on two counts.*** I can't move any further and, to be quite honest with you, if I'm going to be completely honest, I do have to . . . say that part of it is that's just the way I feel . . . . I feel like the case isn't strong enough for me to say guilty. . . ." (Emphasis added.)

Juror No. 8 answered affirmatively when the court then asked whether she was still participating in deliberations (listening to the other jurors' views and relaying her own). When the court asked whether she felt she was entitled to her own opinion regardless of what anybody else thought, she said she had "reheard the testimony. I was open enough to hear it again and maybe pick up on things that I missed the first time, but . . . I haven't changed my position. I've heard it all. . . . I've worked with everybody and yet they keep telling me that I'm not working with them, but I am."

When questioned by defense counsel, Juror No. 8 confirmed that she had joined the majority on two of the counts but felt she was being personally attacked because of her evaluation of the evidence on the other counts. She explained: "I was ready to get up and just literally run, screaming yesterday, but I didn't because I thought, okay, I can't do that because I'm an adult and is the bailiff going to arrest me. Seriously. I don't feel -- I hate to use the word fair because life is not fair. I understand that, but I'm just asking please don't make me go back in there."

Defense counsel then asked whether it would be helpful if she told the foreperson she disagreed and "it looks like we are deadlocked on this case." Juror No. 8 replied, "No. We have. [¶] . . . [¶] [The foreperson] was fine with it. We told the bailiff, but I think the court would like us to keep deliberating. But we are going around and around and around and around and it's getting more and more heated towards me. The fact that we all had to wait for you guys to show up. I was getting just the worst looks. [¶] . . . [¶] . . . It's an incredible amount of pressure." There was more of the same, with Juror No. 8 reiterating her desire to go home but ultimately agreeing that she would continue if it was absolutely necessary.

B.

The court and counsel then met with the foreperson "to try to get a different perspective" about the deliberations and to determine whether the other jurors were pressuring Juror No. 8. The foreman, Juror No. 4, told the court and counsel that Juror No. 8 was not "adequately participating in the deliberations" because "she would not present her views" when asked to do so by the other jurors. Her answer would always be, "I have nothing to say," and she ultimately refused to continue deliberating. Given Juror No. 8's behavior, the foreman did not believe further deliberations would be productive -- explaining that Juror No. 8 would listen to the other jurors but then tell them her mind was already made up. When questioned by the prosecutor, the foreman explained that, in evaluating the witnesses' testimony, Juror No. 8 was speculating about "things that could have happened" but for which there was "no evidence or reason for it."

The court concluded that Juror No. 8 had made up her mind but had not engaged in any kind of misconduct, then with the lawyers' consent called in the jury to first remind them about their responsibilities, then poll them to determine whether further deliberations would be useful.

C.

In the presence of all the jurors, the court told them again that their attitudes and conduct were important, that it was rarely helpful for a juror at the beginning of deliberations to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict, then polled the jurors about whether further deliberations would be helpful. Juror No. 8 said "no" but all of the other jurors said "yes," after which the court ordered all of them to resume their deliberations, which they did at 11:39 a.m.

At 3:27 p.m., the jury sent out a second note: "Could you kindly give us a definition of deadlock? Also, how do we determine if we are deadlocked?" The court responded (by writing on the note): "If jurors individually and/or collectively feel that there is no reasonable probability that a verdict can be reached, then, the jury is deadlocked." At 4:20 p.m., the jury notified the court they had reached verdicts on three counts but were "Deadlocked 11-1, Count 4."

D.

There was no coercion by the court or by the other jurors. However upset Juror No. 8 might have been, she ultimately agreed to resume deliberations (saying only that she did not think it would be fruitful, which it wasn't). As our lengthy quotations from the record show, the court quite carefully avoided any

commentary that might have pressured Juror No. 8 to reach a verdict inconsistent with her personal views of the evidence, and satisfied itself (by questioning the foreman) that the other jurors were not pressuring Juror No. 8. Most importantly, the fact that the jury deadlocked on the hit-and-run count proves that Juror 8 was in no way coerced by the court or the other jurors. There was no impropriety. (*People v. Pride* (1992) 3 Cal.4th 195, 265; *People v. Neufer* (1994) 30 Cal.App.4th 244, 254; *People v. Proctor* (1992) 4 Cal.4th 499, 538-539.)

II.

Horton contends there is insufficient evidence to show that the property at issue in the grand theft count was worth more than $400.[2] We disagree.

Davis testified that the missing television monitor taken from the truck cost $300, that the missing rearview mirror cost $250, and that the missing television antenna cost $45, a total of about $595. Because the testimony of a single witness is sufficient to constitute substantial evidence (*People v. Cudjo* (1993) 6 Cal.4th 585, 608), and because it is not our role to second guess the jurors' credibility calls or to draw inconsistent inferences from the verdict (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Rayford* (1994) 9 Cal.4th 1, 23), no more was required. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

III.

In related arguments, Horton contends the trial court's imposition of the upper term sentence imposed for the vehicle taking was both an abuse of

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[2] Subdivision (a) of section 487 provides that grand theft is committed "[w]hen the money, labor, or real or personal property taken is of a value exceeding . . . $400 [subject to exceptions that do not apply here]."

discretion and a violation of the principles articulated in *Cunningham v. California* (2007) ___ U.S. ___, 127 S.Ct. 856.[3] We disagree.

The trial court listed half a dozen reasons for selecting the upper term sentence, including Horton's prior convictions both as a juvenile and as an adult, and the fact that he was on probation at the time of his current offenses. Because a single aggravating factor supports the upper term sentence (*People v. Osband* (1996) 13 Cal.4th 622, 728-729), and because recidivism is exempted from the rules announced in *Cunningham* (*Cunningham v. California, supra,* 127 S.Ct. at pp. 860, 864-865; *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 246), there is no *Cunningham* error or, if there was, it was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

For the same reason -- Horton's criminal record and particularly the fact that he was on probation at the time of the current offenses -- there is nothing arbitrary or capricious about the trial court's selection of the upper term in this case. (*People v. Sword* (1994) 29 Cal.App.4th 614, 626; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1261.)[4]

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[3] For the reasons stated in *People v. Vera* (1997) 15 Cal.4th 269, 276-278, and *People v. Saunders* (1993) 5 Cal.4th 580, 589, footnote 5, we reject the Attorney General's contention that the *Cunningham* issue was waived by reason of Horton's failure to raise it below.

[4] Horton, who is only 24 years old, had a sustained petition for burglary at age 17, and has had multiple convictions as an adult -- possession of marijuana in 2004 (for which he was fined), disturbing the peace in June 2005 (probation), driving under the influence of alcohol and battery on a peace officer in October and November 2005 (probation), then the current offenses in November 2005.

IV.

Along with the upper term sentence of three years for taking the truck, the trial court sentenced Horton to concurrent terms of two years for grand theft and one year for misdemeanor resisting arrest. Horton contends the concurrent terms violate section 654 and must be stricken. We disagree.

As Horton necessarily concedes, the question is whether his course of criminal conduct is divisible, with the answer depending on his intent and objective. If all the crimes were incident to a single objective, he may only be punished once. (*People v. Nubla* (1999) 74 Cal.App.4th 719, 730-731.) On appeal, the trial court's factual finding -- here, that Horton had a different objective for each offense -- will be upheld if supported by substantial evidence. (*Ibid.*)

These were plainly three separate crimes, each committed with a different intent and for a different purpose. First, Horton took the truck (either to joyride, to keep for transportation, or to strip for parts). Second, he removed several items from the truck (the television monitors, the antenna, and so on) and managed to dispose of some of them before he was apprehended. Third, he resisted arrest. Although one act followed the other, the crimes were not part of the same course of conduct and the concurrent sentences are not barred by section 654. (*People v. Guzman* (1996) 45 Cal.App.4th 1023, 1028.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

VOGEL, Acting P.J.

We concur:

ROTHSCHILD, J.

JACKSON, J.*

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*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.